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No. 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1970

RAYMOND A. SANDERS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1727

RAYMOND A. SANDERS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A 1-12) is reported at 52 T.C. 964. The opinion of the court of appeals (Pet. App. B 13-19) is reported at 439 F.2d 296.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1971. The petition for a writ of certiorari was filed on May 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 162(a) or 62(2)(C) of the Internal Revenue Code, petitioners may deduct as ordinary and necessary business expenses or as employee transportation expenses, their expenses of commuting by private automobile between their place of employment and the closest habitable community, because no public or private transportation was available to them.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 62, 162 and 262 of the Internal Revenue Code of 1954, and of Sections 1.62-1, 1.162-2 and 1.262-1 of the Treasury Regulations on Income Tax (1954 Code), are set forth in the petition (pp. 2-4).

STATEMENT

Petitioners are civilians permanently employed at Vandenberg Air Force Base by various contractor companies having worksites at the base. They live in communities near Vandenberg, since only military personnel are permitted to live on the base. No public or company transportation is available to them in commuting, and they accordingly travel to and from the base in private automobiles.

On their income tax returns for 1965, petitioners deducted their automobile expenses for travel each workday between their worksites on the base and the City of Lompoc, California, which they considered the nearest habitable community to such worksites.

The Commissioner disallowed these deductions on the ground that they were personal commuting expenses and not ordinary and necessary business expenses. The Tax Court sustained the Commissioner's determination (Pet. App. A 1-12) and the court of appeals affirmed (Pet. App. B 13-19).

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. The expenses a taxpayer incurs in traveling between his residence and principal place of employment—commuting expenses—are not deductible either as business transportation expenses or as business traveling expenses; rather these expenses are nondeductible personal expenses within the scope of Section 262 of the Internal Revenue Code. This rule has been firmly established by longstanding Treasury Regulations which were upheld by this Court in *Commissioner* v. *Flowers*, 326 U.S. 465. And, there is no exception to the rule where, as here, a taxpayer cannot avoid incurring commuting expenses because housing closer to his worksite is unavailable. See, *e.g.*, *United States* v. *Tauferner*, 407 F. 2d 243 (C.A. 10), certiorari denied, 396 U.S. 824; *Smith* v. *Warren*, 388 F. 2d 671, 672 (C.A. 9); *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C.A. 5); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C.A. 5).

Petitioners recognize that this Court's decision in *United States* v. *Correll*, 389 U.S. 299, precludes deductions of the claimed expenses under Section 162

(a)(2) of the Code, which allows deductions for "traveling expenses * * * while away from home in the pursuit of a trade or business * * *." In *Correll*, the Court held that a deduction under Section 162 (a)(2) is available only if the travel involves a stop for sleep or rest.

To avoid this limitation, petitioners rely on Section 62(2)(C), allowing deduction of certain trade or business expenses incurred by an employee in connection with the performance of his services, and on the general provision of Section 162(a), allowing deduction of ordinary and necessary business expenses. But the combined effect of these provisions is to allow deductions only for transportation expenses that are incurred by a taxpayer in traveling from one duty station to another, not for commuting expenses. See Treasury Regulations on Income Tax (1954 Code), Sections 1.62-1(g); 1.162-2(e); and 1.262-1(a)(5).

2. Petitioners assert no conflict with any other decision, but rely upon (Pet. 6-7) *United States* v. *Tauferner*, *supra*. The Tenth Circuit there rejected the claim that expenses of commuting are deductible where they are incurred because residence near a jobsite is impractical or impossible. Petitioners attempt to distinguish *Tauferner*, since in that case the taxpayer usually commuted by public bus transportation and only occasionally by automobile, whereas here the commuting, of necessity, was done entirely by automobile. This is a distinction without a difference, as the court of appeals concluded (Pet. App. B 17-18).

Moreover, the decision below eliminates the previously existing conflict between *Tauferner* and *Wright* v. *Hartsell*, 305 F. 2d 221 (C.A. 9). In the latter case, the Ninth Circuit held that a taxpayer who could not live near his place of employment could deduct the expenses he would have incurred in commuting between the worksite and the closest habitable community. *Hartsell*, however, was decided before *Correll*, *supra*, and was predicated on the court of appeals' assumption that travel expenses could be deducted under Section 162(a)(2), even if the taxpayer was not required to stop for sleep or rest. In view of the intervening decision in *Correll*, the government successfully opposed the taxpayer's petition for certiorari in *Tauferner* on the ground that the conflict with *Hartsell* was no longer viable (Br. in Opp. 5-6, No. 156, O.T., 1969). The decision here confirms that the Ninth and Tenth Circuits are in accord with regard to the nondeductibility of unavoidably incurred commuting expenses.

3. It is true, as petitioners claim (Pet. 5-6), that thousands of taxpayer-employees on the west coast of the United States will no longer receive income tax deductions for that portion of their commuting expense attributable to commuting between their worksites and the nearest habitable community. But the flat rule of nondeductibility of commuting expenses, now uniform throughout the United States, is the only feasible rule to apply to such expenses. Viewed in perspective, petitioners' commuting expenses do not differ significantly from the automobile expenses or bus or train fares incurred by many rural, urban,

and suburban commuters. Any attempt to distinguish between commuting expenses according to whether they were unavoidable, or whether the taxpayer had lived as close as reasonably possible to his workplace, would create serious problems of administration and result in unjustifiably different treatment of similarly situated taxpayers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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